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UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

17 Douglas A. Ducey, Governor of the
18 State of Arizona, in his official capacity,
19

20 Plaintiff,

21 v.

22
23 Janet Yellen, Secretary of the Treasury,
24 in her official capacity, *et al.*,
25

26 Defendants.

27
28 Case No. 2:22-cv-00112-SPL

Related case: 2:21-cv-00514-DJH

**DEFENDANTS' MOTION TO
DISMISS**

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1 INTRODUCTION

2 As part of the American Rescue Plan Act, Pub. L. No. 117-2, 135 Stat. 4
3 (2021) (“Rescue Plan” or “Act”), Congress appropriated nearly \$200 billion in
4 new funding for state governments. 42 U.S.C. § 802. States may use these new
5 federal funds to mitigate the public health emergency caused by COVID-19 or its
6 negative economic impacts, among other permissible uses. *Id.* § 802(c)(1). In con-
7 travention of these purposes, however, Arizona has created a program that with-
8 holds federal funds from local school districts that choose to implement a mask
9 policy designed to slow the spread of the coronavirus. The State also provides
10 federal funds to families who transfer their children out of a school that requires
11 masks. These programs are either intended to discourage or have the effect of
12 discouraging local school districts from implementing COVID-19 safety proto-
13 cols in line with Centers for Disease Control and Prevention (“CDC”) guidance.

14 The Rescue Plan provides the Secretary of the Treasury with “the authority
15 to issue such regulations as may be necessary or appropriate to carry out this
16 section.” *Id.* § 802(f). Under this broad grant of authority, the Secretary issued a
17 Final Rule clarifying that states may not use Rescue Plan funds for programs that
18 undermine efforts to stop the COVID-19 pandemic. The Department of the Treas-
19 ery has also sent two letters informing Arizona that its school funding policies
20 are inconsistent with Treasury’s interpretation of the Act.

21 The Complaint should be dismissed for lack of jurisdiction and for failure
22 to state a claim. Because Treasury has not initiated any enforcement proceedings,
23 Governor Ducey (“Governor”) cannot establish that any alleged injury is immi-
24 nent. And to the extent the Governor challenges one of Treasury’s letters, that
25 letter is not a final agency action subject to judicial review. The Final Rule is also
26 within the Secretary’s broad power to issue appropriate regulations under the
27 Rescue Plan, and neither the Final Rule nor the Rescue Plan violates the Spending
28 Clause or the nondelegation doctrine.

BACKGROUND

On March 11, 2021, Congress enacted the American Rescue Plan Act. *See* Pub. L. No. 117-2, § 9901(a) (codified at 42 U.S.C. §§ 802–805). The Rescue Plan establishes a “Coronavirus State Fiscal Recovery Fund,” allocating \$220 billion to “mitigate the fiscal effects” of the pandemic on States, territories, and Tribal governments through 2024. 42 U.S.C. § 802(a)(1); *see id.* § 803(a) (additional \$130 billion for localities). Nearly \$200 billion is allocated for the States and the District of Columbia. *Id.* § 802(b)(3)(A).

The Rescue Plan provides that States may use the funds for pandemic-related purposes. Through 2024, a State may use the funds “to cover costs incurred” “to respond to the public health emergency with respect to the Coronavirus Disease 2019 (COVID-19) or its negative economic impacts, including assistance to households, small businesses, and nonprofits, or aid to impacted industries such as tourism, travel, and hospitality,” among other uses. *Id.* § 802(c)(1)(A). The Rescue Plan also includes two “further restriction[s]” on the use of funds, *id.* § 802(c)(2), one of which is the subject of a related case in this Court, *see generally Arizona v. Yellen*, 550 F. Supp. 3d 791 (D. Ariz. 2021) (Humetewa, J.), *appeal filed*, No. 21-16227 (9th Cir.).¹ If a recipient misuses Rescue Plan funds, the Act provides that Treasury may recoup the amount of any misuse. 42 U.S.C. § 802(e). And the Rescue Plan authorizes the Secretary “to issue such regulations as may be necessary or appropriate to carry out” the applicable statutory provisions. 42 U.S.C. § 802(f). On May 10, 2021, Treasury posted an Interim Final Rule implementing the Rescue Plan, which was published in the Federal Register the following week. See *Coronavirus State and Local Fiscal Recovery Funds*, 86 Fed. Reg. 26,786 (May 17, 2021). The Interim Final Rule sets forth a specific, multi-step procedure for recoupment of any misused funds under the Rescue Plan. *Id.* at 26,811–12.

¹ Defendants have filed a motion to transfer related case, *see* Notice, ECF No. 11, on which briefing is complete.

1 On August 17, 2021, the Governor announced the “Education Plus-Up
 2 Grant Program.” Compl. ¶ 38, ECF No. 1. Through this program, Arizona allo-
 3 cated \$163 million in Rescue Plan funds to school districts and charter schools on
 4 the condition that the schools do *not* require students to use face masks during
 5 instructional hours. *Id.* ¶¶ 38, 41. The Governor also announced the “Educational
 6 Recovery Benefit Program,” which provides \$10 million in Rescue Plan funds to
 7 families of children who are in school districts that *do* require masks to be spent
 8 on tuition and other expenses associated with sending children to a different
 9 school that does not require masks. *Id.* ¶¶ 42–43.

10 On October 5, 2021, Treasury sent a letter to the Governor stating that the
 11 agency was “concerned that” these two programs “undermine evidence-based ef-
 12 forts to stop the spread of COVID-19.” Letter from Adewale O. Adeyemo, Deputy
 13 Secretary of the Treasury, to Douglas Ducey, Governor of Arizona, at 1 (Oct. 5,
 14 2021) (“Oct. 5 letter”), ECF No. 1-4. “The purpose of” the Rescue Plan funds “is to
 15 mitigate the fiscal effects stemming from the COVID-19 public health emergency,
 16 including by supporting efforts to stop the spread of the virus,” the letter ex-
 17 plained. *Id.* at 2. As such, Treasury stated, “[a] program or service that imposes
 18 conditions on participation or acceptance of the service that would undermine ef-
 19 forts to stop the spread of COVID-19 or discourage compliance with evidence-
 20 based solutions for stopping the spread of COVID-19 is not a permissible use of”
 21 Rescue Plan funds. *Id.* Treasury “request[ed]” that Arizona “describ[e] how the
 22 State will remediate the issues identified” with these programs, and noted that
 23 “[f]ailure to respond or remediate may result in administrative or other action.”
 24 *Id.* Arizona responded by letter on November 4, 2021, providing the State’s expla-
 25 nation of the intended purpose of the two programs. *See* Letter from Jason Mistle-
 26 bauer to Jacob Leibenluft (Nov. 4, 2021) (“Nov. 4 letter”), ECF No. 1-5.

27 On January 6, 2022, Treasury issued a Final Rule that “adopt[ed] as final the
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1 interim final rule . . . with amendments.” Coronavirus State and Local Fiscal Re-
 2 recovery Funds, 87 Fed. Reg. 4,338, 4,338 (Jan. 27, 2022); *see also* U.S. Dep’t of the
 3 Treasury, *Treasury Issues Final Rule for State and Local Fiscal Recovery Funds Program*
 4 *to Support the Ongoing COVID Response* (Jan. 6, 2022), <https://home.treasury.gov/news/press-releases/jy0550>. The text of the Final Rule explains when a
 5 use of funds is deemed permissible, including for programs or services that “re-
 6 spond[] to” a “harm or impact to a beneficiary or class of beneficiaries caused or
 7 exacerbated by the public health emergency or its negative economic impacts.” *Id.*
 8 at 4,448 (to be codified at 31 C.F.R. § 35.6(b)(1)). The Final Rule preamble further
 9 explains that “[a] program or service that imposes conditions on participation or
 10 acceptance of the service that would undermine efforts to stop the spread of
 11 COVID-19 or discourage compliance with recommendations and guidelines in
 12 CDC guidance for stopping the spread of COVID-19 is not a permissible use of”
 13 Rescue Plan funds. *Id.* at 4,431. “In other words, recipients may not use funds for
 14 a program that undermines practices included in the CDC’s guidelines and rec-
 15 ommendations for stopping the spread of COVID-19.” *Id.* Examples of programs
 16 that would not be a permissible use of funds for this reason include “paying off
 17 fines to business incurred for violation of” COVID-19 safety protocols and “re-
 18 quiring that businesses” and other entities “abstain from requiring mask use . . .
 19 as a condition of receiving” Rescue Plan funds. *Id.*

20 The Final Rule contains the requisite procedures for any recoupment action.
 21 As a preliminary matter, the Final Rule provides that, prior to seeking recoup-
 22 ment, the Secretary may notify recipients of potential violations and provide op-
 23 portunities for informal consultation and remediation. 31 C.F.R. § 35.10(g) (2022).
 24 If Treasury decides to initiate recoupment, it must first “provide the recipient an
 25 initial written notice of the amount subject to recoupment along with an explana-
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1 tion of such amounts.” *Id.* § 35.10(c). Then, if the recipient wants to request con-
 2 sideration, it must submit a request a within 60 days.² *Id.* § 35.10(d). The Secretary
 3 then has 60 days to affirm, withdraw, or modify the notice of recoupment. *Id.*
 4 § 35.10(e). Recipients have 120 days from the Secretary’s final decision to repay
 5 amounts owed. *Id.* § 35.10(f). Further, the Final Rule requires recipients to “invoke
 6 and exhaust the procedures available under this subpart prior to seeking judicial
 7 review.” *Id.* § 35.10(e).

8 On January 14, 2022, Treasury sent a second letter to Arizona stating that,
 9 “[b]y discouraging families and school districts from following [the CDC’s] guid-
 10 ance, the conditions” attached with these programs “undermine efforts to stop the
 11 spread of COVID-19,” and that the programs as currently structured were thus
 12 “ineligible uses” of Rescue Plan funds. Letter from Kathleen B. Victorino to Jason
 13 Mistlebauer, at 2 (Jan. 14, 2022) (“Jan. 14 letter”), ECF No. 1-7. The letter requested
 14 that Arizona either redirect Rescue Plan funds to eligible uses or restructure its
 15 educational programs to eliminate the conditions identified, and noted that failure
 16 to do so “may result in Treasury initiating an action to recoup” Rescue Plan funds
 17 or withholding funds from Arizona’s “second tranche installment” of Rescue Plan
 18 funds. *Id.* Treasury also stated that its “compliance program would welcome the
 19 opportunity to discuss [its] concerns” and that it “is committed to working with
 20 recipients to take advantage of the many eligible uses and great flexibility availa-
 21 ble under” the Rescue Plan. *Id.*

22 On January 21, 2022, the Governor brought this suit challenging the Final
 23 Rule and the January 14 letter. Compl. ¶¶ 74–75, 86–87. The Governor asserts that
 24 both the Final Rule and the January 14 letter exceed Treasury’s authority under
 25 the Rescue Plan. *Id.* ¶ 77, 88. The Governor also claims that the Final Rule is un-

28 ² The Final Rule permits the Secretary to extend or shorten the time periods set forth in 31 C.F.R. § 35.10 (2022).

1 constitutionally ambiguous under the Spending Clause, *id.* ¶ 97, and that the Res-
 2 cue Plan violates the nondelegation doctrine, *id.* ¶ 103. This motion follows.
 3

LEGAL STANDARDS

4 The plaintiff bears the burden of establishing jurisdiction by a preponder-
 5 ance of the evidence. *United States ex rel. Solis v. Millennium Pharms., Inc.*, 885 F.3d
 6 623, 625 (9th Cir. 2018). In order for the Court to have jurisdiction over a challenge
 7 to agency action, the plaintiff must have standing to sue and the claims must be
 8 ripe for adjudication. *See, e.g., Chandler v. State Farm Mut. Auto Ins. Co.*, 598 F.3d
 9 1115, 1122 (9th Cir. 2010). Under Rule 12(b)(6), “a complaint must contain suffi-
 10 cient factual matter, accepted as true, to ‘state a claim to relief that is plausible on
 11 its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v.*
 12 *Twombly*, 550 U.S. 544, 570 (2007)).

ARGUMENT

I. THE GOVERNOR’S CLAIMS ARE NOT JUSTICIALE.

A. The Governor lacks Article III standing and the case is unripe.

To satisfy the “irreducible constitutional minimum” of Article III standing – as required to invoke this Court’s jurisdiction – the Governor must first demonstrate “a concrete and particularized” injury in fact that is “actual or imminent.” *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992).

As an initial matter, any conceivable harm arising out of the allegations in the Complaint runs to the State of Arizona, which is not named as a plaintiff in this lawsuit.³ If, at some point, Treasury seeks recoupment or withholds future funds, the State of Arizona would incur a pocketbook injury to its treasury. *See* 42 U.S.C. § 802(b)(3)(A) (directing that Rescue Plan funds be available to the “States”). In general, an official named in his or her “official capacity” is to be treated the same as the entity he or she represents. *Kentucky v. Graham*, 473 U.S.

27 ³ Notably, the Arizona “department of law,” the agency charged with “[r]epre-
 28 sent[ing] th[e] state in any action in a federal court,” Ariz. Rev. Stat. Ann. § 41-193,
 is not involved in this action.

1 159, 166 (1985). Here, however, the Governor has disavowed that any harm to the
 2 State is attributable to him. *See* Pls.' Response in Opp'n to Mot. to Transfer, at 6,
 3 ECF No. 16. Instead, the Governor asserts that because *he* instituted the educational
 4 programs at issue, he has been harmed, separate from any fiscal consequence to the State. *See id.* at 5; *see also* Compl. ¶¶ 75, 87. Such an injury is not
 5 cognizable.
 6

7 In any event, no injury to the Governor—or the State—is imminent. The
 8 Governor's pre-enforcement claims are thus hypothetical and speculative. *See Pub.*
 9 *Serv. Comm'n of Utah v. Wycoff Cnty.*, 344 U.S. 237 (1952). "For there to be jurisdiction
 10 over a preenforcement challenge, 'there must be a genuine threat of imminent
 11 prosecution.'" *Skyline Wesleyan Church v. Cal. Dep't of Managed Health Care*, 968 F.3d
 12 738, 747–48 (9th Cir. 2020) (quoting *Thomas v. Anchorage Equal Rts. Comm'n*, 220
 13 F.3d 1134, 1139 (9th Cir. 2000)). "[N]either the mere existence of a proscriptive
 14 statute nor a generalized threat of prosecution satisfies the 'case or controversy'
 15 requirement." *Thomas*, 220 F.3d at 1139.

16 The Governor lacks pre-enforcement standing to seek a judicial resolution
 17 of the disagreement between Treasury and the State concerning the permissibility
 18 of the State's grant programs because Treasury has not initiated recoupment pro-
 19 ceedings or even stated unequivocally that it would do so. The October 5 letter
 20 says only that a failure to comply with Treasury's request "may result in admin-
 21 istrative or other action." Oct. 5 letter, at 2 (emphasis added). The January 14 let-
 22 ter likewise states only that a failure to remediate "may result in Treasury
 23 initiating an action to recoup" Rescue Plan funds or that "Treasury may . . . with-
 24 hold funds from the State of Arizona's second tranche installment." Jan. 14 letter,
 25 at 2 (emphasis added). Further, Treasury's January 14 letter invited Arizona to
 26 engage constructively to find allowable uses for the funds. *See* Jan. 14 letter, at 2.
 27 Such "informal consultation" and alternate resolution processes, which are con-
 28 templated in the Final Rule, are distinct from the recoupment procedures, which

1 Treasury has not initiated. *See* 31 C.F.R. § 35.10(g) (2022); 87 Fed. Reg. at 4,439
 2 (“Treasury may pursue other forms of remediation and monitoring in conjunc-
 3 tion with, or as an alternative to, recoupment.”). Given the broad nature of Treas-
 4 ury’s statements, the absence of Treasury action initiating its administrative
 5 recoupment process, and Treasury’s stated “commit[ment] to working with
 6 [State and Local Fiscal Recovery Fund] recipients,” Treasury may exercise its en-
 7 forcement discretion not to seek recoupment.⁴

8 The speculative nature of the Governor’s pre-enforcement claims is high-
 9 lighted by the fact that questions remain about what enforcement might look like.
 10 The January 14 letter does not state whether Treasury might recoup funds based
 11 on past misuse of funds, or only with respect to further expenditures under these
 12 programs. As noted above, a necessary first step for Treasury to seek recoupment
 13 is for Treasury to calculate the amount subject to recoupment and send a notice
 14 with an explanation of such amounts. *See* 31 C.F.R. § 35.10(c) (2022). Treasury has
 15 done neither of these things.

16 Because Treasury may decide not to initiate enforcement proceedings
 17 against Arizona, and because the contours of such proceedings, should they oc-
 18 cur, remain unclear, the Governor’s effort to seek a pre-enforcement judicial res-
 19 olution of the dispute between Treasury and the State is improper. These claims
 20
 21

22 ⁴ Treasury’s decision may be impacted by, among other things, its review of infor-
 23 mation provided by Arizona in its report filed for the period March 3, 2021 to De-
 24 cember 31, 2021. Arizona’s submission provided additional information regarding
 25 the education programs at issue, including Arizona’s identification of its expend-
 26 itures for these programs as eligible under 42 U.S.C. § 802(c)(1)(A). Treasury may
 27 seek additional information from recipients to clarify information provided in
 28 these reports, including, in the case of Arizona’s education programs, more infor-
 mation regarding how these programs aim to achieve the cited eligible uses of
 funds to respond to the disproportionate impacts experienced by certain popula-
 tions as a result of the public health emergency.

1 should be adjudicated, if at all, *after* Treasury has taken enforcement action. Indeed,
 2 courts routinely review agency decisions requiring the repayment of federal funds
 3 *after* they occur. *See, e.g., Bennett v. Dep’t of Educ.*, 470 U.S. 656, 658
 4 (1985) (explaining that “the dispute is whether the Secretary correctly demanded
 5 repayment based on a determination that Kentucky violated requirements that
 6 Title I funds be used to supplement, and not to supplant, state and local expend-
 7 itures for education”); *Bennett v. New Jersey*, 470 U.S. 632, 637 (1985) (explaining
 8 that the dispute arose out of the Secretary’s final decision ordering repayment of
 9 specified federal education funds). That is exactly the path the Court should take
 10 here by dismissing this case for lack of jurisdiction.

11 For similar reasons, this challenge to the Final Rule and the January 14 letter
 12 is not ripe. *Nat’l Park Hosp. Ass’n v. Dep’t of Interior*, 538 U.S. 803, 807–08 (2003); *see*
 13 *also Bishop Paiute Tribe v. Inyo Cnty.*, 863 F.3d 1144, 1153 (9th Cir. 2017) (discussing
 14 the overlap between standing and ripeness). The Governor’s claimed harm here
 15 rests on the potential recoupment or withholding of some funds. *Alcoa, Inc. v.*
 16 *Bonneville Power Admin.*, 698 F.3d 774, 793 (9th Cir. 2012). But recoupment or with-
 17 holding may never come to pass. *See Arizona*, 550 F. Supp. 3d at 798 (finding that
 18 Arizona lacked standing because enforcement was not certain). And even if Treas-
 19 urey does institute enforcement proceedings, the amount that may be subject to
 20 recoupment is not yet known. So there has not been any “concrete action applying
 21 [Treasury’s] regulation to [the Governor’s] situation in a fashion that harms or
 22 threatens to harm him.” *Nat’l Park Hosp. Ass’n*, 538 U.S. at 808; *see Mont. Env’t Info.*
 23 *Ctr. v. Stone-Manning*, 766 F.3d 1184, 1190 (9th Cir. 2014).

24 Finally, the Final Rule provides extensive notice and process in advance of
 25 any payment coming due. Consistent with providing such notice and process, the
 26 Final Rule requires that recipients exhaust its procedures before seeking judicial
 27 review. 31 C.F.R. § 35.10(e) (2022). The Governor has not exhausted the available
 28 administrative remedies. *See Darby v. Cisneros*, 509 U.S. 137, 144 (1993) (noting that

1 an agency may impose an exhaustion requirement through regulation).

2 **B. The January 14 letter is not a final agency action.**

3 To the extent the Governor challenges the January 14 letter itself, *see Compl.*
 4 ¶¶ 85–93, his claim is unreviewable because the January 14 letter is not a “final
 5 agency action.” 5 U.S.C. § 704.⁵ An agency action is “final” only if two conditions
 6 are met. “First, the action must mark the consummation of the agency’s deci-
 7 sionmaking process—it must not be of a merely tentative or interlocutory nature.
 8 And second, the action must be one by which rights or obligations have been
 9 determined, or from which legal consequences will flow.” *Fairbanks N. Star Bor-*
 10 *ough v. U.S. Army Corps of Eng’rs*, 543 F.3d 586, 591 (9th Cir. 2008) (quoting *Bennett*
 11 *v. Spear*, 520 U.S. 154, 177–78 (1997)); *see also Sackett v. EPA*, 566 U.S. 120, 127
 12 (2012) (explaining that “consummation” means that an agency action is “not sub-
 13 ject to further Agency review”). Thus, “*Bennett* directs courts to look at finality
 14 from the agency’s perspective (whether the action represents the culmination of
 15 the agency’s decisionmaking) and from the regulated parties’ perspective
 16 (whether rights or obligations have been determined, and legal consequences
 17 flow).” *Soundboard Ass’n v. FTC*, 888 F.3d 1261, 1271 (D.C. Cir. 2018). The Janu-
 18 ary 14 letter fails both prongs.

19 First, the January 14 letter is not the culmination of Treasury’s deci-
 20 sionmaking process. Rather, it represents one step in a multi-step process. As
 21 discussed above, the letter states only that Treasury “may” take certain actions
 22 to recover misused funds. Treasury has not yet initiated any such proceedings,
 23 and it maintains enforcement discretion to choose not to initiate proceedings. In-
 24 deed, Treasury previously sent a different letter, on October 5, similarly inform-
 25 ing the State that certain consequences may flow from its misuse of Rescue Plan
 26 funds, suggesting that each of these letters is just one communication in a back-
 27 and-forth between the State and Treasury. More communications between the
 28

⁵ The Final Rule, on the other hand, is a final agency action.

1 parties may follow before Treasury's ultimate determination on whether and
 2 how to recover funds, so these intermediate communications do not represent a
 3 consummation of the decisionmaking process.

4 Second, no legal consequences flow from the January 14 letter. As dis-
 5 cussed above, Treasury has not definitively stated that it will seek to recover any
 6 misused funds. Nor has Treasury decided what specific amounts it would seek
 7 to recover, a necessary precursor to seeking recoupment. Because the January 14
 8 letter does not determine any legal consequences for Arizona – much less specify
 9 the remedial actions to be taken or the timeframe for which misused funds will
 10 be recovered – the “legal consequences” prong is not satisfied. There is currently
 11 no final agency action arising from the letter for this Court to review.

12 II. THE GOVERNOR FAILS TO STATE A CLAIM ON THE MERITS.

13 The Governor puts forth three arguments on the merits. First, he claims that
 14 the Final Rule exceeds the Secretary's authority under the Rescue Plan. Second,
 15 he argues that the Final Rule violates the Spending Clause because it is unconsti-
 16 tutionally ambiguous. Third, he claims that, if the Final Rule is authorized by
 17 statute, then the Rescue Plan is an unconstitutional delegation of legislative au-
 18 thority. None of these claims has merit.

19 A. The Final Rule is “necessary or appropriate” to carry out the pur- 20 poses of the funds appropriated by the Rescue Plan.

21 The Final Rule falls well within the Secretary's authority to issue regula-
 22 tions. The statute expressly states that “[t]he Secretary shall have the authority to
 23 issue such regulations as may be necessary or appropriate to carry out this sec-
 24 tion.” 42 U.S.C. § 802(f). The Final Rule is “appropriate” to carry out Congress's
 25 provision of funds to the States under Section 802.

26 Addressing similar enabling language in other statutes, the Supreme Court
 27 has concluded that this language grants the agency “broad authority.” *Mourning*
v. Family Publ'ns Serv., Inc., 411 U.S. 356, 365 (1973) (quotation marks omitted).
 28 More specifically, “[w]here the empowering provision of a statute states simply

1 that the agency may ‘make . . . such rules and regulations as may be necessary to
 2 carry out the provisions of this Act,’” the Court held that “the validity of a regu-
 3 lation promulgated thereunder will be sustained so long as it is ‘reasonably re-
 4 lated to the purposes of the enabling legislation.’” *Id.* at 369 (quoting *Thorpe v.*
 5 *Hous. Auth. of Durham*, 393 U.S. 268, 280–81(1969)). The same is true of statutes
 6 that authorize regulations as the Secretary finds to be “appropriate.” *See, e.g., Ar-*
 7 *kansas v. Oklahoma*, 503 U.S. 91, 105 (1992); *GEO Grp., Inc. v. Newsom*, 15 F.4th 919,
 8 930 (9th Cir. 2021) (noting that “statutory language—‘appropriate’ and ‘neces-
 9 sary and proper’—is a hallmark of vast discretion” (footnote omitted)). Notably,
 10 § 802(f) uses the disjunctive “or.” The Final Rule does not need to be both “nec-
 11 essary” *and* “appropriate”; it is authorized so long as it satisfies the broader “ap-
 12 propriate” standard.

13 The Rescue Plan is generally intended to mitigate the negative effects of the
 14 COVID-19 crisis. *See* 42 U.S.C. § 802(a)(1). The Act provides states with funds
 15 that may be used “to respond to the public health emergency with respect to
 16 [COVID-19] or its negative economic impacts,” among other permissible uses. *Id.*
 17 § 802(c)(1). Consistent with the statute, the Final Rule says that States may use
 18 Rescue Plan funds to “respond[] to . . . harms” that are “caused or exacerbated
 19 by the public health emergency,” or to “mitigat[e] and prevent[]” COVID-19 “in
 20 a manner that is consistent with recommendations and guidance from the
 21 [CDC],” among other permissible uses. 87 Fed. Reg. 4,448–49. And the Final Rule
 22 further clarifies that States may not use Rescue Plan funds “for a program that
 23 undermines practices included in the CDC’s guidelines and recommendations
 24 for stopping the spread of COVID-19.” *Id.* at 4,431. These restrictions are “rea-
 25 sonably related to the purpose of” the funds appropriated by the Rescue Plan.
 26 *Mourning*, 411 U.S. at 369. Programs that have the opposite effect, *i.e.*, that per-
 27 petuate the pandemic by “undermin[ing]” recommended CDC practices, do not
 28 help “to respond to the public health emergency.” It was therefore appropriate

1 for Treasury to explain that such uses of Rescue Plan funds are inconsistent with
 2 the Act.

3 The Governor argues that the Final Rule is not authorized by § 802(f) be-
 4 cause each of the two permissible uses of funds in § 802(c)(1)(A) – “respond[ing] to
 5 the public health emergency” and “respond[ing] to . . . its negative economic
 6 impacts” – are distinct options for recipients. *See Compl. ¶ 79.* Because Arizona’s
 7 educational programs fall under the latter (economic impacts), the Governor
 8 says, Treasury has no authority to impose a condition that promotes the former
 9 (the public health emergency itself). *See id.* This argument ignores Treasury’s
 10 “broad authority” under § 802(f). *Mourning*, 411 U.S. at 365. Because one of the
 11 purposes of the Rescue Plan is to mitigate the public health crisis, it is appropriate
 12 for Treasury to prohibit uses of funds that have the opposite effect. Were it oth-
 13 erwise, States could disregard the CDC’s evidence-based guidelines, prolonging
 14 the pandemic while using the federal government’s money to respond to the (un-
 15 necessarily prolonged) pandemic’s “negative economic impacts.” 42 U.S.C.
 16 § 802(c)(1)(A). It is irrelevant that the State believes it is pursuing a different goal
 17 of the Act. The Final Rule tells States that they may not undermine one purpose
 18 of the Act while claiming to advance another purpose. And the Secretary’s broad
 19 authority clearly encompasses this common-sense conclusion.⁶

20 Finally, the Governor contends that the Final Rule violates the so-called
 21 “major questions doctrine” because Congress has not spoken clearly enough to
 22

23 ⁶ The Governor also complains that Treasury does not have “expertise in matters
 24 of public health,” and the Final Rule therefore goes beyond the Secretary’s author-
 25 ity. *Compl. ¶ 82.* But the CDC does, and the Final Rule sensibly refers to “CDC’s
 26 guidelines and recommendations for stopping the spread of COVID-19.” 87 Fed.
 27 Reg. at 4,431. This is no oddity; agencies often must assess a variety of topics,
 28 sometimes in consultation with other agencies and outside experts, *see, e.g., Idaho*
Wool Growers Ass’n v. Vilsack, 816 F.3d 1095, 1102 (9th Cir. 2016) (discussing the
 requirements of 42 U.S.C. § 4332(2)(C)), and a rule siloing an agency’s authority
 only to a narrow field in which it operates would be unworkable.

1 delegate to Treasury the authority to determine that Rescue Plan funds may not
 2 be used to undermine COVID-19 mitigation protocols. Compl. ¶ 81 (citing *Ala.*
 3 *Ass'n of Realtors v. Dep't of Health & Human Servs.*, 141 S. Ct. 2485, 2489 (2021);
 4 *Nat'l Fed'n of Indep. Bus. v. Dep't of Labor* ("NFIB"), 142 S. Ct. 661 (2022) (per cu-
 5 riam)). The "major question" canon of construction only applies when an admin-
 6 istrative action represents an "enormous and transformative expansion in [an
 7 agency's] regulatory authority." *Utility Air Regul. Grp. v. EPA*, 573 U.S. 302, 324
 8 (2014); *accord NFIB*, 142 S. Ct. at 665 ("Permitting OSHA to regulate the hazards
 9 of daily life . . . would significantly expand OSHA's regulatory authority . . .");
 10 *see also, e.g., Ala. Ass'n of Realtors*, 141 S. Ct. at 2489; *King v. Burwell*, 576 U.S. 473
 11 (2015); *Gonzales v. Oregon*, 546 U.S. 243 (2006); *FDA v. Brown & Williamson Tobacco*
 12 *Corp.*, 529 U.S. 120, 160 (2000). The Final Rule does not have any such "transfor-
 13 mative" effect. It merely provides Treasury with the authority to oversee a one-
 14 time outlay of federal funds granted to the States.

15 For the same reason, the Governor is incorrect to suggest that the Final Rule
 16 "intrude[s] into areas that are the particular domain of state law." Compl. ¶ 83
 17 (alterations and omissions omitted) (quoting *Ala. Ass'n of Realtors*, 141 S. Ct. at
 18 2489). Quite the opposite: Congress has a sovereign interest in conditioning the
 19 receipt of federal funds "on the States' complying with restrictions on the use of
 20 those funds, because that is the means by which Congress ensures that the funds
 21 are spent according to its view of the 'general Welfare.'" *Nat'l Fed'n of Indep. Bus.*
 22 *v. Sebelius* ("NFIB"), 567 U.S. 519, 58 (2012); *see Sabri v. United States*, 541 U.S. 600,
 23 608 (2004) ("The power to keep a watchful eye on expenditures . . . is bound up
 24 with congressional authority to spend in the first place."); *Oklahoma v. U.S. Civ.*
 25 *Serv. Comm'n*, 330 U.S. 127, 143 (1947) (explaining that Congress has the "power
 26 to fix the terms upon which its money allotments to [S]tates shall be disbursed").
 27 And here, Congress not only provided its own conditions but unequivocally au-
 28 thorized the Secretary to set other conditions by "issu[ing] such regulations as

1 may be necessary or appropriate to carry out this section.” 42 U.S.C. § 802(f). So
 2 the “major questions doctrine” does not apply.⁷

3 **B. The Governor’s Spending Clause claim should be dismissed.**

4 The Governor next claims that the Final Rule violates the Spending Clause
 5 of the Constitution because the underlying statute “is ambiguous in the strings it
 6 attaches to the use of” Rescue Plan funds. Compl. ¶ 97. The Governor is wrong.

7 In *Pennhurst State School & Hospital v. Halderman*, the Supreme Court de-
 8 clared that “if Congress intends to impose a condition on the grant of federal mon-
 9 eys, it must do so unambiguously.” 451 U.S. 1, 17, 24 (1981). But that is not an
 10 onerous requirement: Congress must provide only “clear notice to the States that
 11 they, by accepting funds under the Act, would indeed be obligated to comply
 12 with” certain conditions. *Id.* at 25. The idea is simply to keep Congress from “sur-
 13 prising participating States with post-acceptance or retroactive conditions.” *NFIB*,
 14 567 U.S. at 584 (quoting *Pennhurst*, 451 U.S. at 25); *see City of Los Angeles v. Barr*,
 15 929 F.3d 1163, 1174–75 (9th Cir. 2019).

16 When Congress makes clear that a State’s acceptance of federal funds re-
 17 quires agreement to certain conditions, it can leave further details for an agency
 18 to explain by regulation. *Bennett*, 470 U.S. at 669–72. As the Ninth Circuit has ex-
 19 plained, “Congress is not required to list every factual instance in which a [S]tate
 20 will fail to comply with a condition,” which would be potentially “impossible.”
 21 *Mayweathers v. Newland*, 314 F.3d 1062, 1067 (9th Cir. 2002); *see Bennett*, 470 U.S. at
 22 666 (explaining that “every improper expenditure” need not be “specifically iden-
 23 tified and proscribed” in the statute); *Jackson v. Birmingham Bd. of Educ.*, 544 U.S.
 24

25 ⁷ Even if the major questions doctrine does apply, it is satisfied because Congress
 26 did “speak clearly.” It gave the Secretary the power to issue “necessary or appro-
 27 priate” regulations, including for the purpose of “respond[ing] to the public health
 28 emergency.” 42 U.S.C. § 802(c)(1), (f). This language clearly encompasses the au-
 thority to prohibit recipients from using federal funds in ways that unnecessarily
 prolong the pandemic.

1 167, 183 (2005) (same); *Davis ex rel. Lashonda D. v. Monroe Cnty. Bd. of Educ.*, 526
 2 U.S. 629, 650 (1999) (same); *Van Wyhe v. Reisch*, 581 F.3d 639, 650 (8th Cir. 2009)
 3 (similar). Congress must simply “make the existence of the condition itself—in
 4 exchange for the receipt of federal funds—explicitly obvious.” *Mayweathers*, 314
 5 F.3d at 1067; *see also Benning v. Georgia*, 391 F.3d 1299, 1307 (11th Cir. 2004) (distin-
 6 guishing statutes where it is “unclear [] whether the [S]tates incurred any obliga-
 7 tions . . . by accepting federal funds”); *Charles v. Verhagen*, 348 F.3d 601, 607 (7th
 8 Cir. 2003) (“[T]he existence of the conditions [must be] clear, such that States have
 9 notice that compliance with the conditions is required.” (citations omitted)). One
 10 court in this district recently held exactly that. *Arizona*, 550 F. Supp. 3d at 797.

11 Here, the statute appropriates Rescue Plan funds to alleviate the pandemic’s
 12 harms and authorizes the Secretary to issue all “necessary or appropriate” regula-
 13 tions. *See supra* Section II.A.; 42 U.S.C. § 802(f). The Final Rule then sensibly ex-
 14 plains that States may not use Rescue Plan funds in ways that disincentive
 15 compliance with public-health measures. This process of legislation and subse-
 16 quent regulatory explication is nothing new and bears no infirmity. *See Biden v.*
 17 *Missouri*, 142 S. Ct. 647, 652 (2022) (noting that “Congress has authorized the Sec-
 18 retary [of Health and Human Services] to impose conditions on the receipt of Med-
 19 icaid and Medicare funds that ‘the Secretary finds necessary in the interest of the
 20 health and safety of individuals who are furnished services’” (quoting 42 U. S. C.
 21 § 1395x(e)(9)); *see Bennett*, 470 U.S. at 669–72.

22 **C. The Rescue Plan does not violate the nondelegation doctrine.**

23 Finally, Plaintiffs contend that, if the Rescue Plan authorizes the Secretary
 24 to issue the Final Rule, then the Rescue Plan must be an unconstitutional delega-
 25 tion of legislative authority. Compl. ¶¶ 100–05. “[A] statutory delegation is con-
 26 stitutional as long as Congress lays down by legislative act an intelligible
 27 principle to which the person or body authorized to exercise the delegated au-
 28 thority is directed to conform.” *United States v. Melgar-Diaz*, 2 F.4th 1263, 1266–
 67 (9th Cir. 2021) (internal quotation marks omitted) (quoting *Gundy v. United*

1 *States*, 139 S. Ct. 2116, 2123 (2019)), cert. denied, 142 S. Ct. 813 (2022). “Under mod-
2 ern precedent, the intelligible principle test imposes ‘an exceedingly modest lim-
3 itation.’” *United States v. Motamed*, No. 20-10364, 2022 WL 101951, at *1 (9th Cir.
4 Jan. 11, 2022) (quoting *Melgar-Diaz*, 2 F.4th at 1266). This requirement is satisfied
5 here. The statute gives the Secretary the authority to issue regulations that are
6 “necessary or appropriate” to carry out the purpose of the Act, including “re-
7 spond[ing] to the public health emergency.” 42 U.S.C. § 802(c)(1), (f). The Su-
8 preme Court has previously upheld statutory authority directing agencies to
9 protect the “public health” through regulations. *Whitman v. Am. Trucking Ass’ns*,
10 531 U.S. 457, 473 (2001). And even directives to regulate in the “public interest”
11 have been found to articulate an intelligible principle. *Id.* (quoting *Nat'l Broad-
12 casting Co. v. United States*, 319 U.S. 190, 225-26 (1943)). Given that the Rescue
13 Plan provides even more guidance for the Secretary than the delegations upheld
14 by the Supreme Court—authorizing the Secretary “to issue such regulations as
15 may be necessary or appropriate *to carry out this section*”—the Rescue Plan does
16 not run afoul of the nondelegation doctrine. 42 U.S.C. § 802(f) (emphasis added).

CONCLUSION

18 The Court should dismiss the Complaint for lack of jurisdiction or failure
19 to state a claim.

20 | DATED: March 22, 2022 Respectfully submitted,

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